IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 968 of 1998
With
CRIMINAL APPEAL No. 1009 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAVEDBHAI NOORBHAI KURESHI - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR.ASIM PANDYA, FOR H.L. PATEL ADVOCATES for Appellant
MR.H.M.PRACHCHHAK, ADDL. PUBLIC PROSECUTOR for Opponent

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 17/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant came to be tried and convicted for offences punishable under Sections 302 and 324 of the Indian Penal Code by the learned Additional

Sessions Judge, Mehsana camping at Patan.

1.1 The appellant came to be convicted for offence of murder of one Fakirmahmmed Kalubhai Qureshi and is sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for six months.

1.1.1 The appellant is also convicted for offence punishable under Section 324 of the Indian Penal Code for causing hurt to witnesses Abdul Quader Mohmmed Ilias and Shabbir. He is sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for three months. Sentences were ordered to run concurrently. The trial Court ordered that if fine is deposited by the convict and appeal is not preferred within stipulated time against the order of conviction, the amount of fine for offence of murder shall be paid to the heirs of deceased Fakirmahmmed Kalubhai Qureshi as compensation.

1.2 Being aggrieved by the said judgment and order recording conviction, appellant has preferred this appeal.

2. The case of the prosecution in brief is that the appellant alongwith two other accused persons viz. Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi was part of a gathering. They assembled around 12:30 p.m. on 11th January, 1997 in connection with collection of funds for renovation of mosque near Khatkivad at Patan. The collection of funds was mooted by deceased Fakirmahmmed Kalubhai Qureshi; where, the present appellant questioned the deceased about accounts of earlier collection of Rs.26,000/-. The deceased did not give any account therefor and said that the same would be given at appropriate time. This ended into an altercation. It is alleged that the appellant was provoked, annoyed and started giving abuses to the deceased and suddenly drew out a knife and inflicted a blow on the deceased-Fakirmahmmed Kalubhai Qureshi. The deceased tried to ward off the blow, but could not do it successfully and the blow fell on his back and

resulted into stab injury which proved to be fatal for him. The injured witnesses tried to intervene and they also sustained injuries. It is alleged that Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi facilitated the commission of crime by catching hold of the deceased.

2.1 First information report was lodged by Abdul Quader Mahmmed, son of the deceased, who was present at the place of incident and who had sustained injury during the course of transaction while he tried to intervene. On basis of first information report, offence was registered and investigated and the Investigating Agency having found sufficient material against the appellant, filed a charge-sheet in the Court of learned J.M.F.C., Patan. As the offences were triable exclusively by the Court of Sessions, the case was committed to the Court of Sessions by learned J.M.F.C. and Sessions Case No.113 of 1997 came to be registered.

2.2 The Sessions Court framed charge against the accused person at Exh.8. Accused persons pleaded not

guilty to the charge and claimed to be tried. After recording evidence, the trial Court came to a conclusion that the prosecution was successful in establishing charges against the appellant and, therefore recorded the conviction, against which the appellant in Criminal Appeal No.968 of 1998 had preferred this appeal.

2.3 The trial Court acquitted accused Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi. The State being aggrieved by the said order of acquittal preferred Criminal Appeal No.1009 of 1998.

2.4 Appellant in Criminal Appeal No.968 of 1998 is represented by learned Advocate, Mr.Asim Pandya appearing for H.L. Patel Advocates. State is represented by learned A.P.P., Mr.Prachchak. Respondents-Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi in Criminal Appeal No.1009 of 1998 were unrepresented, though notice has been served on them. On being asked, learned Advocate, Mr.Pandya has shown his readiness to assist the Court by working as amicus curiae to represent

the case of respondents in Criminal Appeal No.1009 of 1998.

3. We have heard learned Advocate, Mr.Pandya and learned A.P.P., Mr.Prachchak and they have taken us through the record and proceedings. They have also relied on certain judgments in support of their respective contentions which we propose to deal with in paragraphs to follow.

4. Learned Advocate, Mr.Pandya, submitted that from the evidence, both ocular and circumstantial, it is clear that he may not be able to assail the judgment so far as finding on aspect of involvement of appellant in Criminal Appeal No.968 of 1998 is concerned. He submitted that the prosecution evidence even if taken at face value would indicate that the incident occurred all of a sudden over a trifle issue of giving accounts in respect of money collected for renovation of mosque resulting into an altercation. It has come in evidence that the eligibility of the appellant to ask for accounts was challenged by the deceased which annoyed and provoked the appellant.

Mr.Pandya, submitted that appellant was aged about 19 when the incident occurred. A young man who was in last year of his teens and who had just attained majority was hurt so badly that he lost his self-control in the heat of passion incident occurred. Mr.Pandya, submitted that only one blow has proved to be fatal. There is no other injury on person of the deceased. The witnesses have sustained injuries while they were trying to intervene and therefore intention on part of the appellant to cause murder of the deceased cannot be read. Mr.Pandya, submitted that the incident had occurred suddenly and the evidence of eye-witnesses would indicate that the first blow had fallen on one of the witnesses. Mr.Pandya, submitted that there are inconsistencies in the evidence. The evidence also indicates that first blow had fallen on deceased and the witnesses sustained injury while they intervened. There was no intention to commit murder either of the deceased or to cause even grievous hurt to them. The case would fall in exception 4 to Section 300 of the Indian Penal Code and conviction therefore may be punishable under Section 304 (Part-I) or (Part-II) and not under

Section 302 of the Indian Penal Code.

4.1.1 Mr.Pandya, however, submits that since involvement of the appellant is not challenged and since the injuries sustained by the witnesses were sustained by them as a co-incident which emerges from prosecution evidence, he does not challenge the conviction under Section 324 of the Indian Penal Code.

4.2 Mr.Pandya, while acting as amicus curiae submitted that the evidence of the eye-witnesses clearly indicates that respondents in the State appeal viz. Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi were sought to be implicated falsely. The trial Court has assigned cogent reasons for recording their acquittal and the Court may not interfere with the finding of the trial Court in that regard in an acquittal appeal filed by the State and that Criminal Appeal No.1009 of 1998 be dismissed, while Criminal Appeal No.968 of 1998 be allowed to the extent of altering the conviction under Section 304 (Part-I) or (Part-II) from Section

302 of the Indian Penal Code.

5. Mr.Prachchak, has opposed Criminal Appeal No.968 of 1998. According to Mr.Prachchak, evidence indicates that the appellant did not stop on first blow. He has inflicted repeated blows although, only one has fallen on the deceased. The witnesses have sustained injuries with knife and therefore, his intention has to be read as one of the committing murder of the deceased. Mr.Pandya, submitted that the trial Court has committed an error in recording acquittal of accused- Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi. They are alleged to have caught hold of the deceased which facilitated causing of murder of the deceased at the hands of convict. According to Mr.Prachchak, had they not caught hold of the deceased, the deceased could have defended himself and probably survived. The trial Court has overlooked this aspect, has recorded acquittal therefore, that Criminal Appeal No.1009 of 1998 may be allowed.

6. We have taken into consideration rival side

contentions and have given a close scrutiny to the evidence.

7. The medical evidence is in form of Dr.Ramanlal Baldevbhai Patel at Exh.17. He had performed the postmortem and had treated the injured witnesses. He speaks of having noticed a stab wound on 7th vertebral region to 9th and 10th right rib back side situated obliquely with angle region. The injury was of the size of 10 x 11.2 Centimeters going deep into the right pleural cavity. Corresponding internal injuries were also found. According to him, the cause of death was haemorrhagic shock due to injury to vital parts like pleura, lungs and livers, etc. The doctor has opined that the injury was possible with the muddamal knife. That the injuries were sufficient in ordinary course of nature to cause death.

8. Since Mr.Pandya is not seriously challenging the involvement of the appellant in the incident and since he is not disputing that the death of the deceased was homicidal, we do not propose to dwell

into the medical aspect in depth, but it is clear from the postmortem notes, medical certificates and deposition of the doctor that the death of the deceased was homicidal referable to a stab injury in back of the chest. We also find that the medical evidence in respect of injury is available only in respect Abdul Quadar and Mohmmed Ilias. There is no medical evidence to support the say of the eye-witness-Shabbir about he sustaining injuries in the incident.

9. From evidence of witnesses, Abdul Quadar @ Salim Fakirmahmmod at Exh.22, Mohmmed Ilias Dadabhai at Exh.37 and Sabbirbhai Jamalbhai at Exh.36, we notice that a group of persons had assembled near Khatkivad at Patan. In that group deceased was also present, so also, the appellant and injured persons. The deceased had mooted the idea of collecting funds for renovation of mosque which was opposed to by the appellant. According to the appellant, account for Rs.26,000/- collected earlier by the deceased for the very purpose was not given by the deceased. The discussion generated heat leading to an altercation.

It has also come in evidence that the deceased told the appellant that he should not poke his nose into a discussion amongst elderly. This provoked the appellant and he started flinging abuses at peak of his voice. He took out knife and assaulted the deceased. In the transaction one blow fell on person of the deceased which proved to be fatal. Abdul Quadar and Mohmmed Ilias intervened and sustained injuries which as per medical evidence do not seem to be of serious nature and can be termed as simple hurt. The appellant is a butcher by profession. He was aged about 19 when the incident occurred and in the entire transaction, if we see, maximum three blows can be said to have been inflicted by him. Though Shabbir claims to have sustained injury, there is no corroborative medical evidence. The injury on person of Mohmmed Ilias is superficial and only skin-deep; whereas, injury of Abdul Quadar is also simple in nature which is sustained by him on his index finger and middle finger. These injuries are also simple in nature.

9.1 From the evidence of eye-witnesses we find

that the evidence regarding the sequence of blow and on aspect of whom they were aimed at, there are inconsistencies but fact that emerges from evidence is that appellant was gripped in heat of passion when incident occurred.

9.2 The appellant is butcher by profession. The incident has occurred near Khatkivad area and it has come in evidence that such knives are freely available in market. In our opinion, the appellant cannot be said to have acted in unusual manner or in a cruel manner nor can he be said to have taken undue advantage of the situation. The incident has occurred in an open street where many persons had assembled. The incident has occurred out of a discussion amongst persons who had assembled resulting into an altercation and it is not possible to infer any premeditation. The appellant, a young boy aged about 19, was snatched in his force which enraged him and he lost his self-control. He appear to have been gripped by heat of passion resulting into assault by him.

9.3 Our attention was drawn to decision in case of ***State of Himachal Pradesh Vs Rampal, reported in A.I.R. 2005 SC 4058*** where in a very similar set of facts (the accused caused one injury with knife to witness and caused two injuries to deceased), the Apex Court took a view that the view taken by the High Court altering sentence from Section 302 to Section 304 (Part-I) was proper. The decision would be applicable to facts of this case. We are of the view that looking to the age of the appellant when the incident occurred and the circumstances in which the incident occurred, the case would fall under exception 4 to Section 300 of the Indian Penal Code. In our view, the trial Court committed an error in recording conviction under Section 302 of the Indian Penal Code, instead of, it should have been one under Section 304 of Indian Penal Code. We, therefore, propose to alter conviction of the appellant from Section 302 to Section 304 of the Indian Penal Code.

9.4 Now, the question would be whether the case of the appellant would fall within Part-I of Section 304 or Part-II of Section 304 of the Indian Penal

Code. On reading evidence, we find that the appellant has inflicted a blow with knife on the deceased. It also transpires that when the appellant was in process of inflicting the blow, deceased tried to ward off the blow and, in doing so, he took a turn, the blow therefore fell on back of the chest. The injury has gone deep into thoracic cavity which speaks of force which was used by the appellant in inflicting the injury. The appellant has inflicted two more blows which has caused serious injuries to witnesses. The intention on part of the appellant to cause death of the deceased or of causing such serious injury as likely to cause death can safely be inferred. We are of the view therefore, that the case of the appellant would fall punishable under Section 304 (Part-I) of the Indian Penal Code.

10. So far as conviction under Section 324 of the Indian Penal Code is concerned, learned Advocate, Mr.Pandya has conceded to the conviction and has made statement at the bar that the appellant does not challenge the said conviction. We, therefore, do not propose to interfere with that part of the judgment

and order.

11. We have heard learned Advocate, Mr.Pandya, as well as learned A.P.P., Mr.Prachchak on question of sentence. Mr.Pandya, submitted that the appellant is in jail for nearly 9 years. He was aged about 19 when the incident occurred. He hails from a poor family where education level is too low. Appellant is engaged in profession of a butcher and therefore, mercy may be shown to him and minimum punishment may be inflicted.

11.1 Learned A.P.P., has submitted that though conviction is altered by this Court from Section 302 to Section 304 (Part-I) of the Indian Penal Code, the sentence part may not be interfered with looking to the manner in which the incident has occurred. The appellant has committed the offence over a petty cause of seeking accounts of the donation amount.

12. We have taken into consideration rival side submissions. The appellant is in jail for nearly nine years. He was aged 19 when the incident

occurred. He was about to cross the threshold of teens. There are no criminal antecedents. He hails from a less educated family and has no criminal antecedents. We are of the view that ends of justice would be met, if he is sentenced to undergo rigorous imprisonment for the period which he has already undergone. There shall be no change in punishment so far as fine is concerned.

13. So far as State Appeal against the acquittal is concerned, we find that witnesses Imtiyaz and Sabbir do not support the version that the acquitted respondents-Noorbhai Chandbhai Qureshi and Mehmoodbhai Chandbhai Qureshi caught hold of the deceased to facilitate the infliction of blows by the appellant convict-Javed. We are therefore of the view that the view taken by the trial Court is not an impossible one and therefore we deem it not proper to interfere with the said order of conviction.

14. Criminal Appeal No.968 of 1998 stands partly allowed. Conviction and sentence under Sections 324 of the Indian Penal Code is confirmed.

14.1 Conviction of the appellant for offence of murder punishable under Section 302 is altered to one under Section 304 (Part-I) of the Indian Penal Code. The appellant is sentenced to undergo rigorous imprisonment for the period which he has already undergone. There shall be no change in punishment so far as fine is concerned.

14.2 Criminal Appeal No.1009 of 1998 preferred by the State is dismissed.

15. In the end, we place on record our appreciation of services rendered by learned Advocate, Mr.Asim Pandya as amicus curiae in Criminal Appeal No.1009 of 1998 in defending the interest of acquitted respondents.

(A.L.DAVE, J.)

(BANKIM N. MEHTA, J.)

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